88-693

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AUGUSTUS J. SIMMONS,

Petitioner,

v.

J. WILLIAM BURNS, COMMISSIONER
CONNECTICUT DEPARTMENT OF TRANSPORTATION;
T. ALLAN McARTOR, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION;
EDWARD ROGIN, ESQ., ET AL,

*Respondents.**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AUGUSTUS J. SIMMONS
Pro Se

Address:
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a Judgment rendered by a State Referee to take private lands for the benefit of a Federal agency, Federal Aviation Administration, without statutory authority, without jurisdiction, without appraisals, without due compensation, and, in concealment of illegal and unlawful leases entered into between the Connecticut Department of Transportation and the Federal Aviation Administration — is invalid.

2. Whether the Federally protected rights under 49 C.F.R. part 25, promulgated by the United States Department of Transportation as the lead agency, upon the dictates of P.L. 91-646 and P.L. 100-17, having been denied to Petitioner in the unconstitutional seizure of private property for Federal navigational aids has resulted in unjust, unreasonable, arbitrary, and capricious acts by Defendants.

3. Whether the Courts below erred in dismissing a private property owner's action for declaratory and injunctive relief against the Federal Aviation Administration, and its agents, as being engaged in an ongoing navigational servitude upon Petitioner.

4. Was the Defendants' entry upon private property of Petitioner, installation of its navigational aids on the property, and re-entry to maintain and extend such equipment, actionable as a trespass absent payment of due compensation and failure to institute due process proceedings under 49 U.S.C. § 1348(b), 42 U.S.C. § 4633(a)(b) and 49 C.F.R. §§ 25.101, 25.102?

5. Whether the Courts below erred in dismissing a private property owner's action against the Federal Aviation Administration, and its agents, for engaging in fraud, duress, collusion, conspiracy and bad faith in violating the owner's right to exclude.

6. Did the District Court err in granting summary judgment for Defendants (Rogin-Hirtle)?

*LISTING OF PARTIES

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Respondents and other interested parties,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 14, 1988.

OPINIONS BELOW

The District Court final judgment denying Petitioner's motion to reconsider and dismissing all remaining claims against all remaining Defendants, dated May 18, 1988, is printed at page 2a, infra, and is not officially reported. The judgment of the United States Court of Appeals for the Second Circuit, dated September 14, 1988, is printed at page 4a, and is not officially reported. [88-6093].

The District Court judgment on the Federal, State, and Airlines' motion to dismiss AUGUSTUS J. SIMMONS' complaint, dated April 10, 1985, is printed at page 6a, infra, and is not officially reported. The judgment of the United States Court of Appeals for the Second Circuit, dated November 22, 1985, is printed at page 7a, infra, and is not officially reported. [85-6087].

The petition for a rehearing on the Federal Defendants' motion to dismiss AUGUSTUS J. SIMMONS' ejectment action by the United States Court of Appeals for the Second Circuit, dated February 10, 1984, was denied and is printed at page 9a, infra, and is not officially reported. [83-6257].

The District Court judgment on the Federal Defendants' motion to dismiss AUGUSTUS J. SIMMONS' ejectment complaint, dated August 24, 1983, is printed at page 11a, infra, and is not officially reported. The judgment of the United

States Court of Appeals for the Second Circuit, dated December 20, 1983, is printed at page 12a, infra, and is not officially reported. [83-6257].

The District Court order on motion of AUGUSTUS J. SIMMONS on withholding of Federal funds for airport development, filed under combined cases of H-81-778 and 83-6043 was denied as moot on August 17, 1983 and is printed at page 15a, infra, and is not officially reported. Appeal No. [83-5141].

The District Court ruling on Federal Defendants' motion to dismiss complaint of AUGUSTUS J. SIMMONS, dated February 7, 1983, is printed at page 16a, infra, and is not officially reported. The opinion (statement) of the United States Court of Appeals for the Second Circuit, dated June 9, 1983, is printed at page 21a, infra, and is not officially reported. [83-6043].

The District Court ruling on Defendants' motion to dismiss and discharge attachments in a civil rights action by AUGUSTUS J. SIMMONS, Civil No. 14806, dated April 3, 1972, is printed at page 24a, infra. The judgment of the United States Court of Appeals for the Second Circuit, dated January 19, 1973, is printed at page 33a, infra, and is officially reported at *Simmons* v. *Wetherall*, 472 F.2d 509 (1973).

STATEMENT OF JURISDICTION

The date of the order and judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed is September 14, 1988, which is also the date of its filing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and under rule 17.1 of the United States Supreme Court Rules.

STATUTES INVOLVED

The Federal Aviation Act of 1958, as amended, Title 49, United States Code, section 1348(b), states as follows:

> "The Administrator is authorized within the limits of available appropriations made by Congress, (1) to acquire, establish, and improve air-navigation facilities wherever necessary; (2) to operate and maintain such air-navigation facilities; (3) to arrange for publication of aeronautical maps and charts necessary for the safe and efficient movement of aircraft in air navigation utilizing the facilities and assistance of existing agencies of the government so far as practicable; and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic."

The Uniform Relocation Act of 1971, as amended, Title 42, United States Code, section 4633(a), states as follows (cited in pertinent part):

> "The head of the lead agency shall —
>
> (1) develop, publish, and issue, with the active participation of the Secretary of Housing and Urban Development and the heads of other Federal agencies responsible for funding relocation and acquisition actions, and in coordination with State and local governments, such regulations as may be necessary to carry out this chapter.
>
> (3) Monitor, in coordination with other Federal agencies, the implementation and enforcement of this chapter and report to the Congress, as appropriate, on any major issues or problems with respect to any policy or other provision of this chapter."

The regulations promulgated pursuant to Title 42 U.S.C. section 4633(a) are contained in 49 C.F.R. §§ 25.101 and 25.102. 25.102 (basic acquisition policies) reads (cited in pertinent part):

> (a) [Expeditious Acquisition] The agency shall make every reasonable effort to acquire the real property expeditiously by negotiation.
>
> (b) [Notice to Owner] As soon as feasible, the owner shall be notified of the agency's interest in acquiring the real property and the basic protections provided to the owner by law and these regulations.
>
> (c) [Appraisal and Invitation to Owner] Before the initiation of negotiations, the real property shall be appraised and the owner or the owner's designated representative shall be given an opportunity to accompany the appraiser during the appraiser's inspection of the property.
>
> (d) [Establishment and Offer of Just Compensation] Before the initiation of negotiations, the agency shall establish an amount which it believes is just compensation for the real property. The amount shall not be less than the approved appraisal of the fair market value of the property, taking into account the value of allowable damages or benefits to any remaining property. Promptly thereafter, the agency shall make a written offer to the owner to acquire the property for the full amount believed to be just compensation.
>
> (f) [Basic Negotiating Procedures] The agency shall make reasonable efforts to contact the owner or the owner's representative and (1) discuss its offer to purchase the property including the basis for the offer of just compensation, and (2) explain its acquisition

policies and procedures, including its payment of incidental expenses in accordance with § 25.106. The owner shall be given reasonable opportunity to consider the offer and present material which the owner believes is relevant to determining the value of the property and to suggest modification in the proposed terms and conditions of the purchase. The agency shall consider the owner's presentation.

(h) [Coercive Action] The agency shall not advance the time of condemnation, or offer negotiations or condemnation or the deposit of funds with the Court, or take any other coercive action in order to induce an agreement on the price to be paid for the property.

(j) [Payment Before Taking Possession] Before requiring the owner to surrender possession of real property, the agency shall —

(1) pay the agreed purchase price to the owner; or

(2) in the case of a condemnation, deposit with the Court, for the benefit of the owner, an amount not less than the agency's approved appraisal of the fair market value of such property, or the Court award of compensation in the condemnation proceeding for the property.

In exceptional circumstances, with the prior approval of the owner, the agency may obtain a right-of-entry for construction purposes before making payment available to an owner.

(l) [Inverse Condemnation] If the agency intends to acquire any interest in real property by exercise of the power of eminent domain, it shall institute formal

condemnation proceedings and not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.

The Administrative Procedure Act [5 U.S.C. § 701, and 5 U.S.C. § 702] (cited in pertinent part):

5 U.S.C. § 701 —

(a) This chapter applies, according to the provisions thereof, except to the extent that —

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

5 U.S.C. § 702 —

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a Court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States; provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the Court to dismiss any action or

deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT OF THE CASE

Augustus J. Simmons, the Petitioner herein, commenced this action for declaratory and injunctive relief against the United States of America, the Federal Aviation Administration (F.A.A. herein), the State of Connecticut and the Connecticut Department of Transportation (State herein), the Metropolitan District Commission of Hartford, Connecticut, and several lienholders and attorneys representing the respective interests (see listing page ii), all respondents herein pursuant to an action initiated in the State Court on August 10, 1987, moved to the United States District Court for the State of Connecticut on a verified petition for removal of a civil action from State Court by T. Allan McArtor, Administrator, F.A.A., dated September 21, 1987, pursuant to 28 U.S.C. § 1441(b), § 1442(a)(1) and § 1446 (d), seeking declaratory and injunctive relief against the illegal and unlawful seizure and utilization of three parcels of land in the town of East Granby, Connecticut, without due process, without compensation, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, and to recover damages for trespass and expenses Congressionally mandated by Federal regulations and State statutes, promulgated pursuant to P.L. 91-646 and amendments to the Uniform Property Acquisition Act P.L. 100-17.

On or about February 28, 1962, the State of Connecticut filed a taking on the Land Records of the Town of East Granby, Connecticut, at Vol. 38, P. 596, without notice and without compensation. Upon placement of the condemnation

notice on the Land Records, F.A.A. proceeded to install the I.L.S. (instrument landing system) on SIMMONS' property. No compensation was paid by F.A.A. to the owner, no compensation was paid by F.A.A. to the State, and NO compensation by F.A.A. was paid into the Court as required by law. It is a FACT that F.A.A. has not paid ONE DOLLAR for the trespassing on Simmons' property from 1962 to the filing of this appeal. Petitioner made written demand of F.A.A. on several occasions, most recently in 1982 and 1983, for rent for use of the premises, and was rebuffed. On November 11, 1964, Anastasia Simmons sold all of the property that is subject of this dispute to Augustus J. Simmons. On October 25, 1967, SIMMONS prevailed in a State Court action and had the taking of February 28, 1962 adjudicated illegal (155 Conn. 502). In 1967, SIMMONS began an action for ejectment, trespass, and to quiet title against the State in the State Court. (This action would continue to 1977.) On January 25, 1968, the State again filed a taking on the Land Records at Vol. 46, P. 113. On March 30, 1971, SIMMONS again prevailed in the State Court to have the second taking declared illegal, null and void (160 Conn. 492).

In 1971 SIMMONS brought an action in Federal District Court against the STATE and various of its officials under the Civil Rights Act, 28 U.S.C. § 1983. In its decision of January 19, 1973, reported at 472 F.2d 509 (2nd. Cir., 1973), the United States Court of Appeals for the Second Circuit, on appeal from dismissal of the complaint, reversed and remanded with orders to stay the action in the District Court pending resolution of the boundary dispute in State Court.

In November 1974, upon orders from the Administrator of the F.A.A., a permanent security fence was erected around the airport and SIMMONS' land, without notice, without compensation. In 1974, Simmons brought an action in the District Court against both the State and the F.A.A. for an

injunction against Federal funding. The injunction was denied on November 5, 1974, without prejudice and with the added note that "[i]n the event that the State Court unduly delays the litigation, the Plaintiff may renew his claim[.]", ruling on Plaintiff's motion for a preliminary injunction, J. Clarie, dated November 5, 1974, case no. H-74-148.

The record shows the complaint for a preliminary injunction against Federal funding until such time as the F.A.A. or the Secretary of Transportation of the United States acquires good title to the property upon which landing aids are located (civil action H-74-148) was filed May 6, 1974, Defendant State moved for an enlargement of time to July 7, 1974, to answer the complaint, motion was granted on June 5, 1974, and simultaneously while defending the action in the Federal Court, the F.A.A. and the State are entering into a lease of Plaintiff's property. The lease was signed on behalf of F.A.A. by Roland Bisson on May 24, 1974, and on behalf of the Connecticut Department of Transportation by Commissioner Joseph B. Burns on June 11, 1974, and by the Attorney General's office on July 26, 1974, and in the lease, DOTFA 74 NE-0369, Item 10, Page 4 reads: "[t]he lessor hereby warrants that it has acquired and possesses an adequate real estate right in the property described herein, and that it is authorized to grant to the government the rights and interests set forth herein." Property taxes continued to be due and owing by Petitioner to the Town of East Granby while the F.A.A. maintained a servitude upon Petitioner.

From December 1974 to the present, SIMMONS removed the fence and erected "no trespassing" signs on several occasions. In the ejectment and quiet title action, (Docket #162923) a trial was had for thirty days between May 1, 1975 and April 30, 1976. On January 11, 1977, Simmons prevailed in the quiet title action and was granted

damages for trespass and the State was to quit the land within one hundred (100) days. The State never appealed the decision of Referee L. Shapiro of January 11, 1977, and the rental fee of the property from 1964 to 1969 has never been paid. A new and separate action (Docket #199230) was initiated in the State Court in 1977 for rental and damages from 1969 until litigation was concluded.

Several hearing dates for damages (Docket #163875 — return date Jan. 1970) were assigned for December 1977 and January 1978 before Referee L. Shapiro, however, not a single hearing date was held and all scheduled dates were cancelled. Hearing dates scheduled were December 6, 7, 8, 13, 14, 15, 20, 21, and 22, 1977, and January 3, 4, 5, 10, 11, and 12, 1978.

On December 13, 1977, the State, in concert with Plaintiff's attorneys (Rogin-Hirtle), informed Plaintiff to "surrender," in total, all three parcels of real property without establishing fair market value (appraisals), without an assessment of damages, without any consideration for taxes being paid on the property since 1924, but, utilized by the F.A.A. for an I.L.S. (instrument landing system) since 1962. The negotiations and surrender of December 13, 1977 were totally and completely rejected on December 15, 1977 by Plaintiff. Petitioner was not aware, was not informed by Defendants or Plaintiff's counsel that Congress in 1971 enacted the Uniform Real Property Acquisition Act for uniformity in dealing with private property owners where Federal projects or Federal funding is involved.

On January 4, 1978, the State, in concert with Plaintiff's attorneys (Rogin-Hirtle), informed Plaintiff that ALL of the property was not required for airport operations and a second package deal, arranged without Petitioner's knowledge, without establishing fair market value (appraisals),

without considering damages, particularly where there were two aborted condemnations in 1967 and 1971, and the proposal was to date matters back to November 12, 1964, date of acquisition of the real property from his mother, notice was again submitted to the State and Plaintiff's attorneys there would be no completion of contracts as evidenced by the exhibit of the proposed closing date of April 19, 1978. No action of any kind alleging noncompliance with January 4, 1978 proceedings was brought by the State. There is no statutory or procedural authority to wrest the property from its owner by Referee L. Shapiro without having brought suit thereon.

At neither of the abbreviated sessions of December 13, 1977 or January 4, 1978 was any mention or reference made to F.A.A., their exclusive jurisdiction and responsibility for the navigational aids on Plaintiff's property, or, their continual utilization, without compensation, of the premises.

On June 2, 1978, Referee Shapiro, at the urging of Plaintiff's attorneys, who had withdrawn from Simmons' matters on April 19, 1978, and instituted suit against Plaintiff, renders a Supplemental Judgment without acquiring jurisdiction of the subject matter, without service of process upon all parties to the action, without any determination of fair market value or damages, without any legal or statutory authority — and in complete disregard for the uniform procedures required in acquiring real property for a Federal project, declares: "I am taking this land for the State of Connecticut." Connecticut General Statutes 48-12 and 8-129 outline the prerequisites to such dictatorial practice.

On June 7, 1982, Asst. Atty. Gen. Victor Feingold for the State of Connecticut, stated to the Court (Dupont, A., Judge) that the judgment of Referee Shapiro of June 2, 1978 was a nullity, null and void, that Referee Shapiro

never had jurisdiction to seize private property for a Federal project, that no action was ever brought by the State to enforce any negotiations — [and] the Statute of Limitations has passed and the State cannot enforce any agreements of 1977 and 1978, and — the State should NOT pay any compensation to any leinholders to acquire title to the property. On July 7, 1982, by memorandum of decision, Judge A. Dupont, upon the characterizations of Asst. Atty. Gen. Feingold, REFUSED to pay any further compensation. Unless a judgment concludes a matter, there is no finality and Referee Shapiro, by his own memo of July 18, 1980 (Petitioner's Ex. #5), acknowledged he did not, could not, finalize the matter and perhaps the Superior Court could handle the complications he anticipated. The Judgment of June 2, 1978, lacking finality in character and not susceptible of enforcement, cannot put an end to litigation, must be set aside.

On October 15, 1981, Petitioner initiated an action in the District Court (H-81-778) for injunctive relief and punitive damages. During 1983 an ejectment action (Docket #83-225) was initiated and on August 16, 1983, District Judge Cabranes dismissed the complaints on res judicata. It was not until April 1982 that Petitioner, through the office of Atty. Margaret Dean, could establish the nature and content of the agreement of January 1955 wherein the State and Federal agencies were to cooperate in obtaining the necessary land interests for Federal navigational aids, and, with the 1955 agreement, a copy of the 1974 lease from the State of Connecticut to the F.A.A. of Petitioner's real property was submitted.

On January 23, 1985, an action was again instituted in the Federal Court (H-85-45), was assigned to Judge Blumenfeld, and the matter was characterized by Judge Blumenfeld as a State matter and dismissed on the grounds of res judicata.

Included in this suit were all airlines servicing Bradley International Airport and using Runway 6 with the aid of navigational instrumentation on Petitioner's property. The Second Circuit dismissed on res judicata (Docket #85-6087).

Petitioner initiated a "Claim for Declaratory Judgment" in the State Court on February 3, 1984, in which rulings were sought on eleven different issues. The State Court refused to hear argument from Petitioner and all claims were denied by the Court, Edelberg, J. On appeal to the State Court of Appeals, the Appeals Court in 3 Conn. App. 672, released May 7, 1985, stated: "[b]ecause of the unusual stance of this case, we do not reach the issue of res judicata, raised by Defendants, since the Plaintiff was not allowed to argue this claim. Nor do we reach the question of whether judicial patience was so stretched by over twenty years of litigation that the Trial Court unfairly denied the Plaintiff a chance to be heard again." "Even had the Plaintiff's claim been legally proper, the record is devoid of any notice to the myriad interested persons, cited in the Claim for Declaratory Judgment, who were not parties to the original suit involved." The record is ultra clear that Defendants, responsible for the acquisition, have never served notice to the myriad interested persons, which is a necessary prerequisite for due process and compensation.

On August 10, 1987, Petitioner filed a new action in State Court, Docket #334855, in which process of service was made on all necessary parties, excluding the airlines, and, after a flurry of motions, none of which were acted upon, a verified Petition for the Removal of a Civil Action from State Court was filed by T. Allan McArtor, Administrator, F.A.A., on September 21, 1987. From its removal to Federal Court on September 21, 1987, to present, no hearings were permitted or addressed pursuant to due process, failure to pay just compensation, fraud, duress, con-

spiracy, and collusion engaged in by the State and Federal agencies to lease and trespass upon Petitioner's property without paying for the privilege or notifying the owner.

The record is devoid (BLANK) of any due process attempt by the State or the F.A.A. to acquire the subject property since the condemnation attempt of January, 1968, ruled null and void in 1971 by the State Supreme Court (160 Conn. 492). The attempt to acquire private property for a Federal project via Plaintiff's damage action (Docket #163875 (1970)) in 1978 or in 1988 cannot be done. Process of service in an independent action with its own return date for the myriad interested persons must be made by the F.A.A., or its agent, damages must be assessed and no litigation was or could have been made or had by Plaintiff when no action was ever initiated by the Defendants. The filing of the Supplemental Judgment of June 2, 1978, was legally and procedurally impermissible without statutory authority, and Defendants could not, did not, bring suit for enforcement of a null and void judgment that was not conclusive upon the parties and, therefore, could not terminate the litigation.

The decision of the Appeals Court in the verified Petition for Removal of a Civil Action from State to Federal Court (88-6093), filed September 14, 1988, did NOT address the issues before the Court. A motion filed with the Appeals Court dated July 8, 1988, for "Request to Hear *En Banc* the Navigational Servitude Imposed Upon Plaintiff by the Federal Aviation Agency, F.A.A." did not get acted upon until September 21, 1988, eight days after oral argument, and was obviously denied. The Federal regulations promulgated for uniformity in land acquisitions, nationwide, are not permitted at the Hartford District Court level. Damages that are mandated by Federal regulations and reaffirmed by Public Law 100-17, effective April 2, 1987, are not permis-

sible at the Hartford District Court level. The fraud engaged in by the State and Federal agency in leasing of Petitioner's property, without compensation, is not, can not be addressed at the Hartford District Court level. The basic service of process upon all necessary parties to the action for resolution is not permissible by the District Court at Hartford. The basic requirement of appraisals to establish fair market value, applied to each and every Federal project across the country, nationwide, is not permissible by the District Court in Hartford.

The case at bar might be compared to a statement made by a national park service land acquisition officer at a public meeting in Voyageurs National Park in August 1977, (excerpt from: *U.S.* v. *341.45 Acres of Land, St. Louis, Minn.*, 751 F.2d 924 (1984)), Page 927, "[m]y job is to acquire this land for the National Park Service. I hope to acquire it for about 30 [cents] on the dollar. If the landowners cannot accept our reasonable offers, we let the matter ride for a few years. Then if necessary, we go to Court, including trials and appeals. This procedure is very expensive for the landowners. If we cannot agree on our terms, the landowners can hire lawyers at one-third [referring to contingency fee arrangements] and pay the Court costs in addition. All of this takes some several years."

One of the major differences between the case at bar and the above statement is that (Rogin-Hirtle), in concert with the Attorney General's office, — on behalf of the F.A.A., — attempted to acquire the subject property for TEN (10) CENTS ON THE DOLLAR — and forget damages for property that was NOT taken — but condemned twice and abandoned.

ARGUMENT

The decision of the United States Court of Appeals for the Second Circuit affirming the District Court's judgment dismissing SIMMONS' complaint should be reviewed by this Court to resolve an apparent conflict between the Court of Appeals and legislation sponsored by Congress and the Justice Department, and decisions of other jurisdictions concerning the acquisition of private property for Federal projects or where Federal aid is involved.

There is an apparent and obvious conflict between the Court of Appeals of the Second Circuit and other jurisdictions over the responsibility for acquisition of private property for Federal projects by the Federal Aviation Administration for the installation, maintenance and upkeep of its navigational aids in maintaining air safety in and around airports. The F.A.A. has argued in other jurisdictions that the installation of navigational aids and the development of flight paths and procedures are in themselves major Federal actions necessary to make runways operational at all major airports, including Bradley Airport at Windsor Locks, Connecticut. Not only must the F.A.A. "formulate and adopt approach and departure procedures to be used by aircraft operating in the navigable airspace relating to the runways," they must also "establish, operate, and maintain the various air navigation facilities to be used by aircraft approaching to and from the runway." Stipulations of fact: *Atlanta* v. *United States*, 531 F. Supp. 506 (1982). In the case at bar, the Second Circuit has continually attempted to shelter the Federal agency by referring to the navigational aids as a State responsibility which is totally erroneous. A reading of *Simmons* v. *Wetherall*, 472 F.2d 509 (1973) claims that if the State installs an instrument landing system on Plaintiff's land, and a fence, without paying compensation or bringing an action, then Plaintiff would

have a claim. The fact that the United States Congress has granted the F.A.A. "exclusive jurisdiction" over the navigable airspace of the "clear zone" and "exclusive jurisdiction" over the location, installation and maintenance of its navigational aids means specifically that the State, municipality, or any other government entity has no jurisdiction whatsoever over the clear zone area. In another Connecticut case, *United States* v. *New Haven*, 447 F.2d 972 (1971), the Court ruled that the clear zone is the exclusive jurisdiction of the F.A.A. The clear zone being the innermost part of the approach zone at the end of a runway extends out 2700 feet from the end of Runway 6 at Bradley International Airport, thus utilizing approximately three acres, or one-half the acreage of one of three parcels in dispute.

The Federal Aviation Act of 1958 (Act), 49 U.S.C. § 1301-1542 (1976), authorizes the F.A.A. to promote air safety, 49 U.S.C. §§ 1303(a), 1655(c)(1) (1976), and to regulate the use of navigable airspace, 49 U.S.C. §§ 1348(a), 1655(c)(1) (1976). Section 1348(b) reads crystal clear that the Administrator is authorized to: (1) acquire, establish, and improve air navigation facilities wherever necessary. If the F.A.A. wants to delegate, subrogate, contribute financially to the acquisition of real property for its navigational aids, the Uniform Act, P.L. 91-646, sec. 208 (42 U.S.C. § 4628), requires that "[w]henever real property is acquired by a State agency at the request of a Federal agency for a Federal program or project, such acquisition shall, for the purposes of this act, be deemed an acquisition by the Federal agency having authority over such program or project.

F.A.A. could argue that the airspace above the F.A.A. airport landing and takeoff approaches is part of the Federal navigable airspace, and thus part of the Federal public domain — but the Federal government has decided not to fully preempt its rights of control therein, the reason stated

for this Federal reticence as referenced in *Kupster Realty Corp.* v. *State*, 404 N.Y.S.2d 225 at Page 231 is that a full Federal preemption would most likely subject the Federal government to the inverse condemnation suits currently brought against local airport owners, or require it to appropriate navigation easements. While the policy of the United States Supreme Court has been that liability for aircraft noise damage should be imposed upon the owner and operator of the airport, not the Federal government (see *Griggs* v. *County of Allegheny*, 369 U.S. 84, 89-90, 82 S. Ct. 531, 7 L.Ed.2d 585), such is not the case at bar. An invasion of the airspace cannot be categorized with an invasion of the surface of private property and the installation of permanent structures thereon. In such instance the government lacked the authority to open up the airspace to the public without payment of compensation to the owner; (see *Kaiser Aetna et al* v. *United States*, 444 U.S. 164; see also *Portsmouth Co.* v. *United States*, 260 U.S. 327).

Accordingly, the State Courts of Connecticut have recognized that there is no valid enabling legislative authority in State statutes to acquire land for the purpose intended here. In *New Haven* v. *East Haven*, 35 Conn. Sup. 157 at P. 170, the State Court recognized that Tweed Municipal Airport, by Federal regulations, is authorized to acquire land to maintain airport approach zones, including clear and transition zones, 14 C.F.R. § 152.85(d), which presently is 14 C.F.R. § 151.73. *NO* record is available of when the transition to 151.73 was made.

The law of the State of Connecticut has always required definite standards in order that a delegation by the legislature to an administrative agency be Constitutional. In *State* v. *Stoddard*, 126 Conn. 623, where extensive powers were given to a milk administrator by the legislature, the Court, in holding that the delegation was unconstitutional, at page

628, said: "[a] legislature, in creating a law complete in itself and designed to accomplish a particular purpose, may expressly authorize an administrative agency to fill up the details by prescribing rules and regulations for the operation and enforcement of law. In order to render admissible such delegation of legislative powers, however, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests and with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interests and private rights have due consideration[.]" (citations omitted). The State, not having any regulations or standards for airport expansion, cannot effect a valid Constitutional taking. Even if the State had standards, they may be applicable to those airports only when they have been approved by the Director, Office of Airports Standards, or the appropriate Regional Director (14 C.F.R. 152.101(c)).

It is conceded by F.A.A. representatives that they have never sought purchase or condemnation of the land upon which Federal navigational aids are located. The F.A.A. has conceded through its representatives that no search was ever made of the Land Records to ascertain all persons (Defendants) to be notified, prior to any hearing involving compensation. Petitioner has *never* been contacted by F.A.A. relative to purchase, easement, condemnation, compensation or otherwise.

The State has acknowledged the fact that no further condemnation has been attempted since the 1968 attempt was ruled null and void in 1971. The State admits to having withdrawn the deposit money from the Court for the null and void taking of 1971. The State has never produced an

appraisal to establish fair market value. The State acknowledges to never having brought any kind of action against Petitioner for purchase discussions that faltered on December 13, 1977 or January 4, 1978 (Petitioner Ex. #8), and June 7, 1982. The State concedes that no service of process was ever made and no return day established for all persons whose names could be ascertained by a reasonably diligent search of the Land Records. The State concedes to asking the State Court *not* to pay compensation upon a null and void judgment on June 7, 1982.

Based upon the concessions and acknowledgments that are exhibits and matters of record, the position of res judicata by the District Court and the Court of Appeals cannot be supported, and was not supported, and cannot be directed to any Court action by the State where the matter was litigated or could have been litigated.

Where Federally protected rights have been invaded, it has been the rule from the beginning that Courts will be alert to adjust their remedies so as to grant the necessary relief. *Bell* v. *Hood*, 327 U.S. 678, 684, 66 S. Ct. 773, 777, 90 L.Ed. 939 (1946). 49 C.F.R. part 25, subpart B details the applicability and policies of these Federally protected rights of Plaintiff. 42 U.S.C. § 4633(a)(3) requires the U.S. Department of Transportation to monitor the implementation and enforcement of the regulations and report annually to the President's Council on Management Improvement on the implementation of the ACT. (Memorandum of February 27, 1985, 50 F.R. 8953).

Where the issue of FRAUD was put squarely before the District Court and the Court of Appeals for the Second Circuit and the Court refused to permit any hearing or address the issue upon the illegal, unlawful, wanton leasing of Petitioner's private property to the F.A.A. in 1974, co-

inciding with the installation of a "middle marker" by F.A.A. on private land, without notice, without compensation, while Petitioner is paying taxes on the property, and the State is attempting to defend itself in an ejectment action, gives strong indication that the District Court and the Court of Appeals are remiss in attempting to harbor and shelter such activity.

In *Simons* v. *United States*, 413 F.2d 531 (1969), the threshold issue was whether damages could be recovered for trespass by the United States. At page 535 *Simons, supra,* it read: "[o]f prime consideration to the Courts in Texas is the determination of whether the lessor and lessee 'acted in concert in doing the illegal act, or that the injury was the ordinary or natural result of some act which they did.'" At page 536 *Simons, supra,* regards the lessor: "It is to be noted that the U.S. Supreme Court has recognized by reference that a lessor who leased lands it did not own was a trespasser." [*United States* v. *Wyoming*, 331 U.S. 440, 67 S. Ct. 1319, 91 L.Ed. 1590].

Petitioner appeals from an order granting Summary Judgment for Defendants (Rogin-Hirtle). The standard for the entry of Summary Judgment is set forth in Fed. R. Civ., p. 56(c):

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In reviewing a District Court's decision granting summary judgment, the same test applies. Thus, this Court reviews the record *de novo*, to determine whether there exists a material issue of fact.

The reviewing Court cannot decide disputed issues of material fact; it only may determine whether a genuine issue exists and whether the law was correctly applied. Accordingly, it must reverse the grant of a summary judgment motion if it appears from the record that there is an unresolved issue of material fact. 10 *Wright and Miller, Federal Practice and Procedure* § 2716 at 437-38 (1973).

The Judgment of the State Referee, concealing the illegal and unlawful leases entered into between the two bureaucracies, Connecticut Department of Transportation and Federal Aviation Administration, was done wilfully, knowingly, with intent to deceive, and an attempt to shelter the real party in interest — over whom the Referee has no jurisdiction. In the Judgment entered on behalf of the Petitioner on January 11, 1977, case no. 162923, an ejectment action commenced by writ on October 14, 1969, Judgment was entered as follows by the very same Referee who attempted to conceal the leases in 1978.

"Judgment for the Plaintiff granting him possession of the land described in the Complaint as the title owner thereof. The Defendants or their successors shall, within 100 days, vacate the land shown as Parcel C on the map entitled 'Property of Anastasia Simmons east side Rainbow Road, East Granby, Conn., W. M. Alford Civil Engineer, scale 1" - 60 ft., date October, 1964' and recorded at Vol. 12 (map) page 568 of the East Granby Land Records."

"*The Defendants, or their successors, within such legal authority as may exist and permit, shall take appropriate steps towards not renewing the lease to the United States relative to the instrument landing lights situated on said Parcel C.* The Defendants or their successors shall pay to the Plaintiff the amount of $37,813.64 for rent due through October, 1969, together with an appraiser's fee of $1,800.00

and a map allowance of $250.00 to the engineer." Signed, Louis Shapiro, Referee. (Emphasis added.)

The above Judgment having been rendered on January 11, 1977 shows conclusively that Referee Shapiro had full and complete knowledge of illegal and unlawful leases in existence between the two bureaucracies and such information was deliberately withheld from Petitioner on December 13, 1977 and January 4, 1978.

Additionally, quoting from page 13 of the Judgment of January 11, 1977, it reads:

"I further conclude that the Defendants have entered upon the Plaintiff's land without authority or permission for them to do so; that the Defendants have excluded the Plaintiff from all use of said land and still keep him out of possession, depriving him of rents and profits; that the entry and taking of the Plaintiff's land by the Defendants is illegal in that it is in excess of any statutory power given to them to take and hold real property for an authorized purpose; and that the entry and taking of the Plaintiff's land is unconstitutional in that it constitutes a taking of property without just compensation, and without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States and in violation of Article First, Section II of the Connecticut Constitution. The Plaintiff is entitled to possession of aforesaid Parcel C."

The above Constitutional violations rendered as part of the Judgment — misses the mark completely by making no reference to the invasion of the property by the F.A.A. The State merely cut the timber in the approach and clear zones, bulldozed the terrain and mowed the grass, without payment of damages, when the actual invasion of the surface of Petitioner's property by F.A.A. is analogous to the appropriation of the use of private property in *United States*

v. *Causby*, 328 U.S. 256 (1946). There the Court found a "taking" in the government's use of air space above the claimant's land as part of the flight pattern for military aircraft, thus destroying the use of the land as a chicken farm. "Causby emphasized that government had not merely destroyed property [but was] using a part of it for the flight of its planes."

In *Loretto* v. *Teleprompter*, 102 S. Ct. 3164 (1982), the Court affirmed the traditional rule that a permanent physical occupation of property is a taking. In such a case the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

Duress is considered a type of fraud and where Petitioner appeared before Referee Shapiro on January 4, 1978, with new counsel, Attorney Robert King, having requested orally and in writing that the Rogin-Hirtle law firm withdraw from Simmons' matters on December 22, and 23rd, 1977, as not representing his interests, and Petitioner's new counsel was not permitted to represent Petitioner, such high-handed disregard of statutes, regulations, and Petitioner's rights to counsel of choice and Petitioner's rights under Federal legislation where Federal projects or aid (49 C.F.R. Subpart B) met with refusals to transfer of any real property, within a matter of hours, not days — or a reasonable period of time.

Throughout the Complaint in this case, and all previous cases, is the attack on the State Court judgment that procedural due process was not observed, that Federally protected rights were denied, the concealment of material facts pertaining to the leasing of Plaintiff's property by the Connecticut Department of Transportation to the Federal Aviation Administration is fraud upon the Plaintiff, the

failure to pay due compensation in accord with Federally mandated guidelines, the attempt to date matters back to 1964 to obviate the payment of damages where there have been two (2) condemnations and some of the property has since been abandoned, the economic coercion of subsidizing the bureaucracies by paying taxes and lienholders while they occupy the owner's property — scott free, — can be summed up with the citation from *White* v. *Union Producing Co.*, 5th Cir., 1944, 140 F.2d 176 at page 178: "Fraud vitiates everything it touches, it is difficult to define; there is no absolute rule as to what facts constitute fraud; and the law does not provide one 'lest knavish ingenuity may avoid it.'" Citing from *O'Boyle* v. *Bevil*, 259 F.2d 506 at page 517: "A judgment obtained by fraud is a nullity. To establish the fraud as well as the want of jurisdiction to render the judgment for failure to observe the requirements of the State statutes, the Court in which the judgment is brought in question may consider the entire record in the case, pleadings, process, and evidence."

"The case before us presents a typical example where equity will intervene to insure that Appellants are condemned only after hearing and that the whole proceeding will be invested with 'the attribute of justice upon which the exercise of judicial power necessarily depends.'"

A suit presenting such a state of facts must appeal strongly to the sense of justice of any tribunal.

CONCLUSION AND PRAYER

There now exists a conflict in the decisions of the District Court and the Court of Appeals of the Second Circuit and the laws of the United States as are set out in the United States Code with reference to the interpretation and application of Federal regulations to the Federal Aviation Administration, and its agents. Where, upon the evidence, an ongoing navigational servitude is being imposed upon Petitioner without basic fundamental due process or compensation, this case should be remanded to the District Court for a hearing on the merits.

For the foregoing reasons and upon the foregoing authorities' judgment for Defendants should be reversed and the case remanded before an impartial arbiter.

Dated: October 27, 1988

Respectfully submitted,

AUGUSTUS J. SIMMONS
P. O. Box #1
Windsor, Connecticut 06095
(203) 569-6714

By .....

Augustus J. Simmons
Pro Se

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

WILLIAM BURNS, Commissioner, ALLAN McARTOR, Adm., FAA, ATTY. EDWARD ROGIN, JULIA Z. TASHJIAN, THOMAS P. BYRNE, CONNECTICUT NATIONAL BANK AND TRUST, JEROME DIAMOND, LEONIDAS D. SIMMONS, LEONARD ALLAIRE, MARIE ALLAIRE, PATSY VALENTE, ERNESTINE VALENTE, ANGELO RONCARI, ATTY. GERALD A. ROISMAN, JOHN J. ROWLSON, JOHN MASSOW, FLORENCE MASSOW, ALBERT ENDEE, JOHN KATAJA, ATTY. MARGARET DEAN, GERALD F. MIKULSKE, RONALD MUSKATALLO, ATTY. RONALD CASSIDENTO, STEPHEN SILVERMAN, ATTY. ROBERT HIRTLE, DAVID SALZMAN, FRANK ROTHAMMER, JOHN J. BARTIZEK and ROCCO D'ESTITO

CIVIL NO. H-87-732 (JAC)

FINAL JUDGMENT

This cause came on for consideration on plaintiff's motion for reconsideration of the Court's Ruling on Pending Motions and Order, filed March 15, 1988, before the Honorable Jose A. Cabranes, United States District Judge, and the issues having been duly reconsidered and a Ruling on Plaintiff's Objection to Court's Ruling of March 15, 1988, having been filed on May 16, 1988, denying motion to reconsider and dismissing all remaining claims against all remaining defendants, pursuant to Rule 11, Fed.R.Civ.P.,

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of all remaining defendants (summary judgment having been entered in favor of defendants Burns, Comm., McArtor, Adm. of FAA, Rogin, Tashjian and Hirtle on March 16, 1988) dismissing the complaint.

Dated at New Haven, Connecticut, this 18th day of May, 1988.

KEVIN F. ROWE
Clerk, United States District Court

By .....
Deputy in Charge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of September, one thousand nine hundred and eighty-eight.

Present:

HONORABLE J. EDWARD LUMBARD,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges,

HONORABLE CON. G. CHOLAKIS,
*District Judge.**

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

J. WILLIAM BURNS, ET AL.,
Defendants-Appellees.

ORDER 88-6093

Appeal from the United States District Court for the District of Connecticut.

This cause came to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

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*Hon. Con. G. Cholakis, District Judge, United States District Court for the Northern District of New York, sitting by designation.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is AFFIRMED, and appellant is assessed double court costs.

1. We affirm for the reasons stated in the ruling of the district court. We also consider this a frivolous appeal. This is appellant's third appearance before this court in the past five years, and on each occasion res judicata barred or bars his reassertion of the same claims which were either fully litigated or should have been litigated in prior state and federal proceedings. In his last appearance before this court, *Simmons* v. *United States of America, et al.*, Docket No. 85-6087 (2d Cir. Nov. 22, 1985) (unpublished order), appellant Simmons was placed on notice that he risked imposition of sanctions should he seek to appeal the same matters again.

2. It is accordingly appropriate to assess double court costs against appellant pursuant to Fed. R. App. P. 38.

3. We specifically call to appellant's attention that we affirm the order of the district court in all respects, including its injunction against further federal litigation concerning these claims, and that any violation of that injunction may be punished as a contempt of court.

J. Edward Lumbard,
J. Daniel Mahoney,
Circuit Judges

Con. G. Cholakis,
District Judge

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

UNITED STATES OF AMERICA, ET AL

CIVIL H-85-45 MJB

JUDGMENT

This action having come on for consideration of the defendants' motions to dismiss before the Honorable M. Joseph Blumenfeld, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having granted the motions,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered dismissing the plaintiff's complaint.

Dated at Hartford, Connecticut, this 10th day of April 1985.

KEVIN F. ROWE, *Clerk*

By: DENNIS P. IAVARONE
Deputy-in-Charge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 22nd day of November, one thousand nine hundred and eighty-five.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE WALTER R. MANSFIELD,
HONORABLE JAMES L. OAKES,
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

- against -

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

85-6087

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

We agree with the April 8, 1985, order of the district court dismissing appellant's claims on the ground of res judicata. We also consider this a frivolous appeal. Appellant has litigated the same matters numerous times before in both state and federal courts over a period of many years. Because appellant is a pro se litigant, we are not imposing sanctions at this time. However, appellant is hereby placed on notice that he risks imposition of sanctions in the future should he seek once again to relitigate these same matters.

WILFRED FEINBERG,
Chief Judge

WALTER R. MANSFIELD,
JAMES L. OAKES,
Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in related cases before this or any other court.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 10th day of February, one thousand nine hundred and eighty-four.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

ARTHUR B. POWERS,
Commissioner of Department of Transportation,
Defendant-Appellee.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ELIZABETH DOLE,
Secretary of United States Department of Transportation,
FEDERAL AVIATION ADMINISTRATION,
J. LYNN HELMS, Administrator,
STATE OF CONNECTICUT, J. WILLIAM BURNS,
Commissioner of Connecticut Department of Transportation
and CONNECTICUT DEPARTMENT OF
TRANSPORTATION,
Defendants-Appellees.

No. 83-6257

A petition for a rehearing having been filed herein by plaintiff-appellant, Augustus J. Simmons, *pro-se*,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO, *Clerk*

by FRANCIS X. GINDHART,
Chief Deputy Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS,

v.

UNITED STATES OF AMERICA, ELIZABETH DOLE, Secretary of United States Department of Transportation; FEDERAL AVIATION ADMINISTRATION; J. LYNN HELMS, Administrator; STATE OF CONNECTICUT; J. WILLIAM BURNS, Commissioner of Connecticut Department of Transportation

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AUGUSTUS J. SIMMONS

v.

ARTHUR B. POWERS, COMMISSIONER, DEPARTMENT OF TRANSPORTATION

No. H 81-778
and No. 83-225

JUDGMENT

These consolidated actions having come on for consideration of the Defendants' Motions to Dismiss before the Honorable Jose A. Cabranes, United States District Judge; and,

The Court having considered the full record of the case including the applicable principles of law, and the Court having filed its endorsements on August 16, 1983, granting Defendants' motions,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the Defendant dismissing the Plaintiff's complaints.

Dated at Hartford, Connecticut, this 24th day of August, 1983.

SYLVESTER A. MARKOWSKI,
Clerk, United States District Court

By .....
JOHN K. HENDERSON, JR.
Deputy in Charge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of December, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE HENRY J. FRIENDLY
HONORABLE JAMES L. OAKES
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

ARTHUR B. POWERS, etc.,
Defendant-Appellee.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendant-Appellee.

No. 83-6257

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed as follows:

1. This appeal arises out of a dispute over title to and use of land adjacent to Bradley International Airport. It concerns two actions, filed by appellant in the United States District Court for the District of Connecticut, and directed against various state and federal defendants. The complaint in the first case, Civ. No. H-81-778, was filed in October 1981, and subsequently amended. On February 7, 1983, Judge Cabranes granted the federal defendants' motion to dismiss. Simmons appealed, and this court, by order dated June 9, 1983, dismissed the appeal for lack of jurisdiction because the dismissal of the claim against the federal defendants did not constitute a final judgment of the district court. We stated that, to pursue the appeal, Simmons would have to seek the entry of a final judgment as to the federal defendants, or await the determination of the claims against the state defendants.

2. On March 22, 1983, appellant filed the complaint in the second case, Civ. No. H-83-225. On May 23, 1983, Judge Cabranes granted a motion by the State of Connecticut to consolidate both cases. On August 16, 1983, Judge Cabranes dismissed the complaints in the consolidated actions. Simmons now appeals from that dismissal. We agree with Judge Cabranes that the doctrine of res judicata bars the reassertion of these claims, already litigated in state courts. Simmons v. Wetherall, 430 A.2d 1296 (Conn. 1980).

3. The judgment of the district court is affirmed.

WILFRED FEINBERG,
Chief Judge

HENRY J. FRIENDLY,
JAMES L. OAKES,
Circuit Judges.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX H

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS,
Plaintiff.

v.

J. WILLIAM BURNS, AS HE IS THE COMMISSIONER OF THE CONNECTICUT DEPARTMENT OF TRANSPORTATION, AND J. LYNN HELMS, AS HE IS THE ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION
Defendants.

No. 81-778
Appeal No. 83-5141

PLAINTIFF'S MOTION FOR "FINAL DECISION" ON WITHHOLDING OF FEDERAL FUNDS FOR ALL AIRPORT DEVELOPMENT AT BRADLEY INTERNATIONAL AIRPORT
(Preliminary Injunction)

DENIED as moot, in view of the court's disposition of the case. *See* the court's endorsement order (filed Aug. 16, 1983) of the federal defendants' motion to dismiss and the court's endorsement order (filed Aug. 17, 1983) of the state defendants' motion to dismiss. It is so ordered.

JOSE A. CABRANES, *U.S.D.J.*

August 17, 1983, Hartford, CT

APPENDIX I

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION, J. LYNN HELMS, Administrator, Federal Aviation Administration, STATE OF CONNECTICUT, CONNECTICUT STATE DEPARTMENT OF TRANSPORTATION, and J. WILLIAM BURNS, Commissioner, Connecticut State Department of Transportation

No. H 81-778

RULING ON THE FEDERAL DEFENDANTS' MOTION TO DISMISS

JOSE A. CABRANES, *District Judge:*

This procedurally convoluted action arises out of a dispute between plaintiff and various defendants concerning the use of several parcels of land in the town of East Granby, Connecticut. On November 8, 1982, plaintiff filed his Third Amended Complaint, and on December 21, 1982 the federal defendants (the United States of America, the Federal Aviation Administration, and J. Lynn Helms as Administrator of the Federal Aviation Administration) filed a motion to dismiss the claims asserted against them, pursuant to Rule 12(b)(1) and (6), Fed. R. Civ. P. Because this court concludes that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [against these defen-[2]dants] which would entitle him to relief," *Conley* v.

Gibson, 355 U.S. 41, 45-46 (1957), the motion to dismiss must be granted.

I.

The first count of the Third Amended Complaint alleges a claim under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* The pertinent allegations of count one are that the "FAA has placed a middle marker on Parcel C [of which plaintiff alleges he is the owner] and an Instrument Landing System," Third Amended Complaint, ¶ 30; that "the United States Government and the FAA have ousted the Plaintiff from possession of this land since 1964," ¶ 33; and that "the United States and the FAA have never compensated the Plaintiff for their use of Parcels A and C," ¶ 34. According to plaintiff, the instrument landing system was emplaced in 1960, ¶ 6, the middle marker in 1974, ¶ 7.

The statute of limitations for the Federal Tort Claims Act is 28 U.S.C. § 2401(b), which provides in pertinent part that a tort claim against the United States will be barred unless "presented in writing to the appropriate Federal Agency within two years after such claim accrues. . . ." It is undisputed that plaintiff did not commence this action until 1981. Plaintiff does not allege that he filed any federal court action or agency claim before that time.

Plaintiff contends, however, that his claim is not time-[3] barred. That contention derives from plaintiff's reading of two cases, *United States* v. *Dickinson*, 331 U.S. 745 (1947), and *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972). This court is not persuaded that either case cited is on point.

In *Dickinson*, the United States had constructed a dam, and as a result the plaintiff's land was periodically flooded. The dam was completed in 1936, the first flood occurred

in 1937, more extensive flooding took place in 1938, and the plaintiff brought suit in 1943; a six-year statute of limitations was applicable. The Supreme Court held that the action was not time-barred. In *Dickinson*, the plaintiff argued that the Government's action was, before 1938, ambiguous: before the first flood occurred, there was no indication that a taking had occurred or would occur; and before the extensive flood of 1938, it was still uncertain that the Government's intrusion upon the plaintiff's land was sufficient to constitute a taking, or, assuming that there was a taking, it was too soon to determine the extent thereof. The *Dickinson* plaintiff argued, and the Supreme Court agreed, that it was not until 1938 that the fact and the extent of the taking were clear. As Justice Frankfurter, writing for the court, put it: "An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be[4] struck," *United States* v. *Dickinson*, *supra*, 331 U.S. at 749. In the case at bar, however, the Third Amended Complaint can only be read as stating that the Government's alleged tort was complete in 1974. According to the complaint, the alleged tort was neither uncertain nor ambiguous at that time; its extent was apparent; and nothing is alleged to have happened between 1974 and 1981 that changed the nature or extent of the alleged tort.

In *One 1961 Red Chevrolet*, the Fifth Circuit held that, where a change of law creates a new right, a cause of action may, for limitation purposes, accrue at the time of that change of law rather than when the alleged wrong occurred. In the case at bar, however, plaintiff has not alleged any change in the general law. Rather, he has simply alleged that a prior adjudication of his rights with respect to the parcels in question occurred in 1980. Clearly, an application of law, albeit one that changes the legal relations between

two parties, is not the same thing as a change in the law. Thus, *One 1961 Red Chevrolet* — which, at any rate, represents the law of a circuit other than our own — has no bearing on the case before this court today.

In short, count one of the Third Amended Complaint is barred by 28 U.S.C. § 2401(b) and is accordingly dismissed.

II.

In count three of the Third Amended Complaint, plaintiff alleges numerous violations of unspecified "Federal law," ¶¶ 40-46, 49-51, and some specific violations of the Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. §§ 4601 *et seq.* Where violations of that Act are alleged, plaintiff claims the FAA was derelict in fulfilling its statutory obligations in dealing with the State of Connecticut, ¶¶ 47-48, 52-54.

The Government contends that a private right of action will not lie against it to compel fulfillment of such obligations. While this question has not yet been presented to the Court of Appeals for the Second Circuit, those courts of appeals that have considered this issue have unanimously concluded that the "plain language," *Fountain* v. *Metropolitan Atlanta Rapid Transit Authority*, 678 F.2d 1038, 1045 n. 13 (11th Cir. 1982), of 42 U.S.C. § 4602(a) precludes such a right. *See Fountain* v. *Metropolitan Atlanta Rapid Transit Authority*, *supra*; *Roth* v. *United States Department of Transportation*, 572 F.2d 183, 184 (9th Cir. 1978); *Rhodes* v. *City of Chicago*, 516 F.2d 1373, 1377-1378 (7th Cir. 1975); *Will-Tex Plastics Manufacturing, Inc.* v. *Department of Housing and Urban Development*, 345 F. Supp. 654 (E.D. Pa. 1972), *aff'd* 478 F.2d 1399 (3rd Cir. 1973). The exception cited by plaintiff as applicable where a plaintiff is a third-party beneficiary to a contract between federal and state

governments is clearly without relevance here, where plaintiff has not claimed to be a third-party beneficiary — indeed, where such a claim would be contrary to the entire thrust of the complaint.[6]

Thus, count three of the Third Amended Complaint fails to state a claim for relief cognizable under 42 U.S.C. §§ 4601 *et seq.* and is accordingly dismissed.

III.

The federal defendants have also moved to dismiss count five of the Third Amended Complaint. Count five concerns enforceability of a stipulation entered into by plaintiff and the State of Connecticut. It does not appear to this court that count five runs against the federal defendants, and therefore that portion of the federal defendants' motion to dismiss that attacks count five is denied as moot, without prejudice to renewal if it should appear hereafter that plaintiff means count five to run against the federal defendants.

IV.

In summary, the federal defendants' motion to dismiss the Third Amended Complaint insofar as it states claims against them is granted with respect to count one, granted with respect to count three, and denied as moot with respect to count five, without prejudice to renewal. Counts two and four of the Third Amended Complaint do not state claims against any of the federal defendants.

It is so ordered.

Dated at Hartford, Connecticut, this 7th day of February,[7] 1983.

JOSE A. CABRANES
United States District Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of June, one thousand nine hundred and eighty-three.

Present:

HONORABLE WILFRED FEINBERG,
Chief Judge

HONORABLE HENRY J. FRIENDLY
HONORABLE RALPH K. WINTER
Circuit Judges.

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

— against —

UNITED STATES OF AMERICA, FEDERAL AVIATION ADMINISTRATION, ET AL.
Defendants-Appellees.

No. 83-6043

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by appellant pro se and by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from the

judgment of said District Court be and it hereby is dismissed for lack of jurisdiction.

1. This appeal arises out of a dispute over title to and use of land adjacent to Bradley International Airport in Connecticut that has been going on between appellant and the governments of the United States and Connecticut for many years. The third amended complaint in the instant case against various federal and state defendants was filed in November 1982. In an opinion dated February 7, 1983, Judge Jose A. Cabranes dismissed all the counts that he found to be directed against the federal defendants, finding that count one was barred by the applicable statute of limitations and that count three failed to state a claim for relief.

2. Because the claims against the state defendants are still pending before the district court, the dismissal of the claims against the federal defendants is not a final judgment, and cannot be appealed, unless the district court determines that "there is no just reason for delay" and expressly directs the entry of a final judgment. Fed. R. Civ. P. 54(b). Judge Cabranes did not do so in his opinion of February 7. This court is therefore without jurisdiction to hear this appeal, which is dismissed without prejudice. Appellant may seek the entry of final judgment as to the federal defendants in the district court, or he may await the final determination of his remaining claims before appealing all claims to this court.

3. Shortly before oral argument, appellant also moved in this court for a preliminary injunction "against project applications for airport development." The relief sought is the "withholding of federal funds for all airport development at Bradley International Airport per 49 USC 1716(c) until such time as clear title to 'clear zone' is fully and adequately required." Judge Cabranes denied a request for

similar relief in the district court on May 16, 1983, on the ground that relief was sought against the federal defendants only, as to whom the complaint had already been dismissed. In view of our disposition of the main appeal, this motion is also remanded without prejudice to the district court so that when a final judgment is entered, the entire matter may be addressed by this court at the same time.

WILFRED FEINBERG, *Chief Judge*

HENRY J. FRIENDLY
RALPH K. WINTER, *Circuit Judges.*

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX K

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

AUGUSTUS J. SIMMONS

v.

HORACE B. WETHERELL, Director of Aeronautics; DONALD J. LYNCH, Deputy Director of Aeronautics; FRANK C. PARIZEK, EDWARD J. COADY, KINGSLEY GILLESPIE, HUGH C. CURRAN, ARTHUR SACHS and E. DONALD WALSH, The Aeronautics Commission of Connecticut; and HERBERT A. PREISSNER, Manager of Bradley International Airport

Civil No. 14,806

RULING ON DEFENDANTS' MOTIONS TO DISMISS AND TO DISCHARGE ATTACHMENTS

The plaintiff, Augustus J. Simmons, has brought suit under the Civil Rights Act, 42 U.S.C. § 1983, to seek redress against several public officials for two alleged wrongs done to him under color of state law. Jurisdiction is sought under 28 U.S.C. § 1343(3). He complains that certain of his property, principally land abutting a state airport, was taken by the defendants in violation of state law and in violation of the fifth amendment to the United States Constitution;[1] and he complains that the defendants caused him to be illegally arrested, prosecuted and convicted in the state court in violation of his federal civil rights, for cutting through

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[1]The fifth amendment to the United States Constitution provides in pertinent part:

> ". . . nor shall private property be taken for public use, without just compensation."

a fence which the defendants had erected surrounding his property. The defendants have moved to dismiss the complaint on the grounds of sovereign immunity, lack of federal jurisdiction over the subject matter of the complaint, and the tolling of the statute of limitations.

I.

This case has a long and acrimonious history. Taking the facts as stated in the complaint, for purposes of the motion to dismiss, the plaintiff owns about twelve acres of land abutting Bradley International Airport in East Granby, Connecticut. His predecessor in title was his mother, who owned the land when the controversy at the root of this lawsuit began in 1961. At that time, the state Aeronautics Commission began condemnation proceedings against the land under Conn. Gen. Stats. § 15-79 (repealed by 1969 Public Act 768, § 263), which provided in pertinent part:

> "The state or any municipality, or any two or more municipalities jointly, . . . may take any such land or interest therein for such establishment (of an airport) or for the expansion or improvement of an airport when, in the opinion of the (state aeronautics) commission, public convenience or safety requires, and when the approval of the municipality or municipalities in which such land is located has been legally obtained, upon paying just compensation to the owner of such land or interest therein . . . ."

In December 1964 the plaintiff began construction of a restaurant on his land; construction was halted after the foundation had been completed, when the defendants obtained an injunction against further construction on March 3, 1965, on the ground of the pendency of condemnation proceedings.

Although the defendants, acting for the Department of Aeronautics, were successful at trial on the issue of whether the Aeronautics Commission's decision to take the property was unreasonable or in bad faith, the Connecticut Supreme Court, without considering any other assignments of error, ordered a new trial solely on the ground that error was committed in an evidentiary ruling. *State* v. *Simmons*, 153 Conn. 351 (1966). At the new trial, the judge ruled that the taking was invalid since the defendants had failed to obtain the approval of the Town of East Granby, as required by Conn. Gen. Stats. § 15-79, *supra*. This decision was affirmed by the Connecticut Supreme Court. *State* v. *Simmons*, 155 Conn. 502 (1967).

Persisting after these two aborted attempts, on January 9, 1968, the defendants again began condemnation proceedings, this time under Conn. Gen. Stats. § 48-12, the state's general condemnation statute. The plaintiff acknowledges in his complaint that "(t)he effect of this statute was to vest title to the land in the State immediately upon the filing of the statement of condemnation in the Superior Court . . . ." In March 1971 the Connecticut Supreme Court again held the taking illegal, on the ground that takings by the Aeronautics Commission were authorized only by Conn. Gen. Stats. § 15-79, and that the commission could not employ § 48-12. *Simmons* v. *State*, 160 Conn. 492 (1971).

In August 1968 after the defendants had begun the action under § 48-12 but before the Connecticut Supreme Court had declared this proceeding invalid, "the defendants caused the plaintiff to be arrested and charged with a criminal offense for cutting a wire fence erected by the defendants around the plaintiff's property. The plaintiff was convicted and sentenced to six months, execution suspended after three months, plus a fine of $250.00."

The plaintiff also alleges that in April 1968 the defendants caused agents or employees of the Department of Aeronautics to remove certain cinder blocks from his property, which they have refused to return to the plaintiff and for which they have paid him no compensation.

The plaintiff also alleges that the defendants caused certain runway lights to be constructed on his property, which are in use at present and for which he has received no compensation.

In the 1969 session of the state General Assembly, the plaintiff was the beneficiary of the following special act:

> "AN ACT AUTHORIZING AUGUSTUS J. SIMMONS TO SUE THE STATE
>
> Augustus J. Simmons of Windsor is authorized to bring an action at law against the state not later than the first Tuesday of January, 1970, and to recover such damages as may be awarded to him by said court for loss of use of land owned by him in the town of East Granby. Any action brought in accordance with this act shall be brought to the superior court for Hartford county and no costs or interest shall be included in any judgment against the state. Approved May 28, 1969." Special Act No. 170.

Under this waiver of sovereign immunity, the plaintiff brought suit on January 5, 1970, against the defendants Lynch and Wetherell, and against the state of Connecticut, in the Superior Court for Hartford County, Docket No. 163, 875, seeking damages for the losses he allegedly sustained because of the deprivation of the use of his land for several years. The allegations of that complaint are quite similar to those here, except that the plaintiff does not seek redress for his allegedly illegal arrest and imprisonment.

II.

THE CRIMINAL PROSECUTION

The plaintiff seeks damages for his allegedly illegal arrest and conviction, which he claims were "caused" by the defendants. The court is of the opinion that he has failed to state a federal claim upon which relief may be granted.

The plaintiff acknowledges that he was convicted in a state court for cutting a fence erected by the defendants. He may not collaterally attack that conviction here, in the guise of a civil rights complaint. *Goss* v. *Illinois*, 312 F.2d 257 (7th Cir. 1963). See also, *Taylor* v. *New York City Transit Authority*, 433 F.2d 665 (2d Cir. 1970).

Further, his complaint fails to allege that the defendants acted in bad faith; he acknowledges that at the time of the arrest, title to the property had vested, albeit temporarily, in the state, under Conn. Gen. Stats. § 48-12. Public officials are not liable to actions for damages under § 1983 for actions taken in good faith. See *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, —— F.2d —— (2d Cir. Mar. 8, 1972), slip op. at 2024. The failure to allege lack of good faith provides an additional ground for dismissal, for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

III.

WRONGFUL TAKING

The plaintiff's contention that his property was taken without just compensation alleges the deprivation of a constitutional right, and thus is a basis for federal jurisdiction under 28 U.S.C. § 1343(3). *Lynch* v. *Household Fin. Corp.*, 40 U.S.L.W. 4335 (U.S. Mar. 23, 1972).

The court is of the opinion, however, that since the plaintiff merely seeks damages for interference with the use of his property, he does not contend that a taking has occurred within the meaning of the fifth and fourteenth amendments to the United States Constitution.[2] Hence, the complaint must be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6).

Not every interference with the use of property constitutes a taking within the meaning of the fifth amendment:

> "Where the line of demarcation between acts which amount to the taking of an interest in property short of a transfer of title, as distinguished from acts resulting only in tortious interference with a plaintiff's rights in his property, is drawn in a case such as is presented here, requires a determination of whether
>
> > 'the action of the Government has been such as to impose a servitude upon the property which interferes with the use, management, or enjoyment of the same. United States v. Lynah, 188 U.S. 445, 23 S. Ct. 349, 47 L.Ed. 539; Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329, 43 S. Ct. 135, 67 L.Ed. 287; United States v. Causby, 328 U.S. 256, 66 S. Ct. 896, 90 L.Ed. 1004; United States v. Virginia Electric & Power Co., 365

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[2]The court assumes that the protection provided by the fifth amendment against the taking of property without just compensation applies to actions by state officials, through the due process clause of the fourteenth amendment, which provides:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

See *Haczela* v. *City of Bridgeport*, 299 F. Supp. 709, 712 (D. Conn. 1969); cf. *Foster* v. *Herley*, 330 F.2d 87 (6th Cir. 1964).

> U.S. 624, 81 S. Ct. 784, 5 L.Ed.2d 838.' Foster v. Herley, 330 F.2d 87, 90 (6th Cir. 1964).
>
> "The conceptual difference between acts of interference with the use and enjoyment of a person's property by public officials which results only in a claim for damages, and those continuing acts which under all the circumstances ripen into a taking by the government of an interest in the property was discussed in Foster v. Herley, supra. A medley of continuing official acts may develop into so much interference with the owner's use and enjoyment of his property as to justify a finding that it was taken in advance of the formal transfer of title." *Jimmie's, Inc.* v. *West Haven*, Civ. No. 13,503 (D. Conn. Mar. 16, 1970), *aff'd.* 436 F.2d 1339 (2d Cir. 1971).

The plaintiff in his prayer for relief seeks an injunction against further attempts by the defendants to take his property "until such time as appropriate constitutional standards are established governing the taking of land for airport purposes," damages for the deprivation of use of his land, and an injunction against the use of the runway lights which allegedly have been erected on his land "unless adequate compensation is paid to the plaintiff for the right to maintain said lights . . . ."

The plaintiff's prayer for relief is inconsistent with the theory that there has been a constructive taking by the state; indeed, he fervently resists the implication that he recognizes any "servitude" imposed on his property by the defendants. He does not want any interest in his property to be taken.

Although the plaintiff conceivably could have argued that the erection of runway lights on his property resulted

in a taking of that portion of his property on which the lights are situated, so that upon payment of compensation, title to that portion of his land would vest in the state, he has not chosen to do so. Rather, he seeks to have the use of the lights enjoined "unless adequate compensation is paid to the plaintiff for the *right to maintain said lights* . . . ." (Emphasis added). This theory of the case does not comport with a federal claim, since no taking in the constitutional sense is alleged. *Jimmie's, Inc.* v. *West Haven, supra. Contra, Inmobiliaria Borinquen, Inc.* v. *Garcia Santiago*, 295 F. Supp. 203 (D. P.R. 1969). It is quite obvious that throughout this vigorously contested litigation in the state courts the defendants have continuously, although seemingly ineptly, made repeated attempts to pay the plaintiff "adequate compensation." It is equally clear that the plaintiff has continuously resisted those attempts and refused to accept "adequate compensation." What has resulted from the failure of the defnedants to employ the correct procedures to effect a taking of the plaintiff's property is a trespass on his land. It would be paradoxical to now treat the case in this court as a condemnation case. The plaintiff's claim gives rise to an ordinary action in tort for the recovery of damages, not a constitutional claim for "adequate compensation" for a taking under the power of eminent domain.

Nor is federal jurisdiction provided by the plaintiff's claim that he was deprived of his property without due process of law, in violation of the fourteenth amendment to the United States Constitution. The record of success which the plaintiff has achieved in the state courts, by his vigorous efforts to resist the taking of his land by the state officials, shows clearly that he has been afforded adequate due process of law.

In the context of this case, it is also clear that the dispute concerning the concrete blocks, which the plaintiff

alleges were removed from his land by agents of the defendants and taken to airport property, is more properly viewed as a question of who holds title to this property, rather than a question of whether property has been taken without just compensation. In this posture, there is no federal claim with respect to the concrete blocks.

The plaintiff's one remaining claim is that:

> "The alleged standards and criteria applied to justify condemnation of the plaintiff's land were not uniformly applied to other abuttors, including the abutting land owned by the State of Connecticut, and thus the plaintiff was denied the equal protection of the laws in violation of the FOURTEENTH AMENDMENT to the United States Constitution."

Plaintiff here attacks the "sound exercise of discretionary authority," *Barr* v. *Mateo*, 360 U.S. 564, 575 (1959), of the state officials, in their decision to attempt to take his land rather than another's. Sovereign immunity bars such an attack. *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics, supra.*

The defendants' motion to dismiss is granted, on the ground that the plaintiff has failed to state a claim upon which relief may be granted.

SO ORDERED.

Dated at Hartford, Connecticut, this 3rd day of April, 1972.

M. JOSEPH BLUMENFELD
Chief Judge

APPENDIX L

SIMMONS v. WETHERELL
Cite as 472 F.2d (1973)

AUGUSTUS J. SIMMONS,
Plaintiff-Appellant,

v.

HORACE B. WETHERELL, as the Director of Aeronautics, et al.,
Defendants-Appellees.

No. 130, Docket 72-1541.

United States Court of Appeals,
Second Circuit.

Argued Dec. 7, 1972.
Decided Jan. 19, 1973.

Landowner brought civil rights action against state authorities alleging that his property had been taken without due compensation. The United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Chief Judge, dismissed, and the landowner appealed. The Court of Appeals, Smith, Circuit Judge, held that where state authorities had proceeded with reasonable speed in their attempts to condemn landowner's property and any delay arose largely from landowner's efforts at defeating condemnation in state courts, the attempts at condemnation constituted, at most, tortious interference with landowner's property rights and landowner could not maintain a civil rights action arising from the condemnation proceedings, but that landowner's allegations that state had fenced off and put airport runway lights on portion of property owned by landowner without paying him due compensation or instituting court proceedings stated cause of action for deprivation of landowner's

right to enjoy the use of his land; however, resolution of that portion of his complaint would be stayed pending action in state court involving the matter.

Affirmed in part and remanded in part.

1. CIVIL RIGHTS at 13.4(1)

Attempts by state authorities to condemn landowner's property constituted, at most, tortious interference with landowner's property rights and, therefore, landowner could not maintain action against state authorities under statute pertaining to the deprivation of rights secured by the Constitution, where state officials had proceeded with reasonable speed in their attempts to condemn land and any delay arose largely from landowner's efforts at defeating the condemnation in the courts. C.G.S.A. §§ 15-79, 48-12; 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983.

2. COURTS at 303(2)

Appropriate forum for assertion of landowner's tort claim against state authorities based upon effects of apparent ineptitude in condemning landowner's property was in state court. C.G.S.A. §§ 15-79, 48-12; 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983.

3. CIVIL RIGHTS at 13.4(1)

Actions of state authorities in attempting to condemn landowner's property did not constitute a "taking" within ambit of statute pertaining to the deprivation of rights secured by the Constitution. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

4. ACTION at 69(5)
CIVIL RIGHTS at 13.12(3)

Landowner's allegations that state had fenced off land owned by him and had put airport runway lights on it without paying him due compensation or instituting court proceedings were sufficient to state civil rights claim for deprivation of landowner's right to enjoy the use of his land; however, where landowner's claim against state authorities revolved around boundary dispute forming basis of landowner's pending suit in state court, landowner's civil rights action would be stayed pending resolution of the state court action in interest of comity and efficient judicial administration. 42 U.S.C.A. § 1983.

Stephen W. Silverman, Springfield, Mass., for appellant.

S. Victor Feingold, Asst. Atty. Gen. (Robert K. Killian, Atty. Gen. of the State of Connecticut, Clement J. Kichuk, Asst. Atty. Gen., of counsel), for appellees.

Before LUMBARD, SMITH and MANSFIELD, Circuit Judges.

SMITH, Circuit Judge:

This case represents the federal stage of a long-standing and acrimonious court battle between the Simmons family of East Granby, Connecteut and state officials over the latters' attempts to condemn some land adjoining Bradley International Airport. Augustus J. Simmons now appeals from a judgment of the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, Chief Judge, dismissing his § 1983 action against the named state officials for failure to state a claim upon which relief can be granted. We affirm the bulk of Judge Blumenfeld's decision; however,

as to one aspect of this suit, we remand, for the reasons outlined below.

The battle here began when the state aeronautics commission moved under Conn. Gen. Stat. § 15-79, which then governed taking of land for airports,[1] to condemn the Simmons property. Pursuant to the statute, a petition for the determination of compensation was brought by the state in Hartford Superior Court; a judgment was rendered finding the taking reasonable and appointing a referee to assess damages. Anastasia Simmons (appellant's mother), appealed to the Connecticut Supreme Court, which reversed, finding error in the trial court's exclusion of evidence offered to show that property similarly situated had not been taken. State v. Simmons, 153 Conn. 351, 216 A.2d 632 (1966). Since this evidence was held to be relevant on the issue of whether the state had acted arbitrarily in singling out the Simmons land, the case was remanded for a new trial.

While the first suit was pending, Mrs. Simmons died, and Augustus entered the fray.[2] Before the second trial began, he raised as an affirmative defense to the taking the fact that the state authorities had not received the requisite statutory approval from the Town of East Granby before proceeding with the condemnation. The trial court agreed; the Supreme Court affirmed. State v. Simmons, 155 Conn. 502, 234 A.2d 835 (1967). Round two for the Simmons family.

Undaunted, the state tried again, this time attempting to use Conn. Gen. Stat. § 48-12, the general condemnation

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[1]§ 15-79 was repealed by Public Act 768, § 263 (1969).

[2]Even Augustus' succession to the land did not escape the scrutiny of the Connecticut courts. *See* Simmons v. McKone, 158 Conn. 71, 255 A.2d 822 (1969).

statute, which provided for procedures different from § 15-79 in cases where compensation could not be agreed upon by the parties. The Simmons family prevailed again, in Simmons v. State, 160 Conn. 492, 280 A.2d 351 (1971), when the Supreme Court held that the state was required to use the § 15-79 procedure.

At about the same time the abortive condemnation attempts were taking place, a related dispute arose between the state and Simmons over some land upon which runway lights had been placed. Simmons claimed that the land was his; the state said that it was the state's. An ejectment action followed. In Simmons v. Parizek, 158 Conn. 304, 259 A.2d 642 (1969), the Supreme Court held that since the complaint did not allege that the state officials had acted unconstitutionally or in a manner unauthorized by statute, the suit was barred by the doctrine of sovereign immunity. Appellant took the hint, and on October 14, 1969 resurrected the ejectment action, this time alleging that the taking of the land and the erection of runway lights was done both unconstitutionally and without statutory authorization. That suit, Docket No. 162923, Hartford Superior Court, is still pending.

Shortly before the Connecticut Supreme Court decision in Simmons v. Parizek, *supra*, a Special Act was passed by the Connecticut General Assembly, allowing Augustus Simmons to sue the state for damages over "loss of use of land," arising out of the bumbling condemnation proceedings. On January 5, 1970, Simmons brought such a suit, Docket No. 163875, Hartford Superior Court; the action is still pending.

Thus, if there ever was a litigant who knew that his claims would be fairly heard in the state courts, Augustus Simmons was he. Nevertheless, perhaps for a change of setting, he instituted this § 1983 action on December 22,

1971, alleging that his property was taken without due compensation, and seeking damages. Since the complaint alleged deprivation of property rights through state action, jurisdiction was correctly predicated upon 28 U.S.C. § 1343(3). Lynch v. Household Finance Corp., 405 U.S. 538, 92 S. Ct. 1113, 31 L.Ed.2d 424 (1972).

[1] As Judge Blumenfeld recognized, the basic question presented by this suit is whether the attempts at condemnation amount to an unconstitutional taking, or whether they simply constitute at most tortious interference by the state officials with Simmons' property rights. Judge Blumenfeld found that the latter situation was presented by the attempts at condemnation here; we agree.

Simmons relies heavily upon such cases as Foster v. Detroit, 405 F.2d 138 (6th Cir. 1968); Foster v. Herley, 330 F.2d 87 (6th Cir. 1964); and Inmobiliaria Borinquen, Inc. v. Santiago, 295 F. Supp. 203 (D. P.R. 1969), for the proposition that government misuse of the condemnation power can support a § 1983 action. While we have no quarrel with the general proposition, this case is readily distinguishable from the ones cited. In each of those instances, the state officials had begun condemnation proceedings and then let them pend, or had announced redevelopment plans and never brought them to fruition. The result was the "freezing" of the plaintiff's use of his property, and the courts found enough of a taking to state a cause of action under § 1983.

Here, however, the state officials proceeded with reasonable speed, if not efficiency, every time they sought to condemn the land. Each effort at condemnation was accompanied by a prompt resort to the judicial process to perfect the taking; each time, Simmons fought the action, and eventually prevailed. In the cited cases, the damage arose from the state's inexcusable delay in finalizing its eminent domain planning; here any delay arises largely from Simmons'

efforts at defeating the condemnation in the courts. In the cited cases, the crux of the problem was official inaction; here, the state has repeatedly tried to condemn the land and pay Simmons just compensation. While Simmons certainly should not be censured for asserting his rights, neither should state officials be forced to await the natural delays of litigation at their peril, particularly when the issues involved are narrow ones of statutory construction.

[2, 3] This is not to say that Simmons may not have a valid tort claim, based upon the effects of the state's apparent ineptitude here. But the appropriate forum for the assertion of such a claim is the state court, where Simmons now has an action, brought pursuant to the waiver of immunity in the 1969 Special Act, pending. Whatever else the state's actions here amounted to, they did not constitute a taking within the ambit of § 1983. *See* Jimmie's Inc. v. City of West Haven, 436 F.2d 1339 (2d Cir.), cert. denied, 403 U.S. 931, 91 S. Ct. 2254, 29 L.Ed.2d 710 (1971).

[4] Thus, as to the condemnation attempts, we affirm the judgment below. The allegations about the land upon which the runway lights are placed, however, stand on a somewhat different footing. At least at this stage of the proceedings, we must accept Simmons' claim that he owns the land, and that the state had fenced it off and put runway lights on it. Assuming all that to be true, we are unable to conclude that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80 (1957). If the land is in fact Simmons', and the state indeed has fenced it off without paying him due compensation or instituting court proceedings, it would seem that a deprivation of appellant's right to "enjoy" the use of his land is stated. *See Lynch, supra,* 405 U.S. at 544, 92 S. Ct. 1113.

However, as Judge Blumenfeld properly recognized, the taking claim here really revolves around a boundary dispute. It is that same dispute that forms the basis of Simmons' pending suit, Docket No. 162923, in Hartford Superior Court. The resolution of boundary disputes is a matter traditionally within the purview of the state courts; the final decision there will undoubtedly control Simmons' claims here. Thus, while we find a cause of action stated with respect to the land upon which runway lights are placed, and remand, the district court should stay its hand here pending the resolution of the state court action, both in the interests of comity and efficient judicial administration. *See* Klein v. Walston & Co., 432 F.2d 936 (2d Cir. 1970); Mottolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949) (L. Hand, J.)

We have considered appellant's other claims, including those based upon an alleged false arrest and imprisonment, and find them without merit. We affirm the judgment below in part and remand in part for disposition not inconsistent with this opinion.